OSMAN & ANOR. v. PUBLIC PROSECUTOR

[P.C. (Viscount Dilhorne, Lord Morris of Borth-y-Gest, Lord Hodson & Sir Frederick Sellers) May 21, 1968]

[Privy Council Appeal No. 20 of 1967]

International Law — Geneva Conventions — Prisoners of war — Members of foreign armed forces in civilian clothing setting off explosives in non-military building — Right to status as prisoners of war — 1949 Geneva Convention Relative to the Treatment of Prisoners of War.

Constitutional Law — Emergency powers — Emergency legislation and subsidiary legislation — Malaysia Constitution, arts. 8, 150.

Evidence — Confession — Retracted — Admissibility — Corroborative evidence — Conviction.

Penal Code, s. 302 — Murder — Retracted confession — Admissibility — Conviction.

The appellants who were Indonesians were convicted of the murder of three civilians by planting explosives in a building called MacDonald House in Orchard Road, Singapore, during the time of the "confrontation" by Indonesia against Malaysia. Their appeals to the Federal Court were dismissed ([1967] 1 M.L.J. 137). In appealing to the Privy Council, they argued: (a) they were members of the Indonesian armed forces and therefore prisoners of war within the meaning of article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War; (b) the Emergency (Criminal Trials) Regulations, 1964, conflicted with article 8 of the Constitution, and the Emergency (Essential Powers) Act, 1964, did not authorise the making of regulations inconsistent with the Constitution; and, (c) the retracted confessions of the appellants could not be admissible as evidence unless there was corroborative evidence.

Held, dismissing the appeal: (1) under international law it was clear that the appellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Geneva Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they placed the explosives and lit them and when they were arrested;

(2) the phrase "in any written law" in the Emergency (Essential Powers) Act, 1964, includes the Constitution of Malaysia. There was nothing in the context requiring an interpretation different from that prescribed in the Interpretation and General Clauses Ordinance, 1948;

(3) even if, contrary to the view of the Federal Court, corroborative evidence was required before a person can be convicted on his retracted confession, such corroborative evidence was present.

Cases referred to:—

(1) *Yap Sow Keong* v. *Public Prosecutor* [1947] M.L.J. 90, C.A.

(2) *Ex parte Quirin* (1942), 63 S. Ct. 1; 317 U.S. 1; 87 Law. Ed. 3.

PRIVY COUNCIL.

J. C. LeQuesne Q.C. and *John Hayman* for the appellants.

Christopher French Q.C. and *Gerald Davies* for the respondent.

Viscount Dilhorne (delivering the reasons for the decision of the Board): On 20th October 1965 the appellants were convicted in the High Court of Singapore under the Penal Code of the murder of three civilians and sentenced to death. Their appeals to the Federal Court of Malaysia were dismissed on 5th October 1966 and they now appeal by special leave.

On 10th March 1965 at 3.07 p.m. an explosion took place in a building called MacDonald House in Orchard Road, one of the main streets of Singapore. The Hongkong and Shanghai Banking Corporation occupied part of the building. Other parts were occupied by other persons including the Australian High Commission.

Just before the explosion took place, a witness at the trial said he saw a Malayan Airways canvas travelling bag on the floor of the mezzanine floor. Smoke was coming from the bag and he heard a hissing noise. The explosion killed two girl secretaries employed by the bank and injured a driver who died two days later. The appellants were charged with the murder of these three persons.

Later examination of the building showed that the explosive used was 20 to 25 lbs of nitroglycerine.

Three days later, at about 8 a.m., on 13th March, the appellants were rescued from the sea some distance from Singapore by a bumboat man. He saw them in the sea clinging to a plank. The second appellant told him that he and the first appellant were fishermen and had been fishing when their boat had been capsized by another boat. He swore that neither of the appellants was wearing uniform and that one of them was bare bodied and wearing a pair of darkish trousers and the other a sports shirt and pair of long trousers.

A marine police boat came up and the appellants were taken on board it. The police officer on board gave evidence that the appellants were dressed as the bumboat man had said and that they had no identification papers. He said that they told him that they were fishermen. The appellants were taken to the marine police station. The police sergeant at the station said that they told him they came from Indonesia and had been fishing. He too said that they were dressed as the bumboat man had said.

Later that morning the appellants were seen by an inspector of police. He gave evidence that the first appellant told him that he was a fisherman and that the second appellant said that he was a farmer. He also said that they were dressed as the bumboat man had said.

Evidence was also given that when they were admitted to prison they were dressed in this fashion and not in uniform. In prison they were allowed to mix with Indonesian prisoners some of whom were wearing jungle green uni-

form. After that the appellants were seen in uniform.

At 1.25 p.m. on 13th March Inspector Hill interviewed the first appellant and after cautioning him, put a number of questions to him. The first appellant told him that he had come from Java and had come to Singapore at about 11 a.m. on 10th March; that after he and the second appellant had had their lunch, they had gone into a building and up some steps and that they had each placed a bundle containing explosives on the steps before reaching the first floor; that the second appellant had lit the fuse and that they had then left the building. He said that this had happened at about 3 p.m.

At 2.35 p.m. the same day the first appellant was charged with the murder of the three persons killed by the explosion. He was again cautioned and he then made a statement saying that he had come to Singapore at about 11 a.m. on 10th March, that he had gone with the second appellant to look for a target, that he and the second appellant had placed "two bundles of explosives on stairs before reaching the first floor", that the second appellant had lit the fuse and that after that they had left and taken a bus.

In neither of these statements did the first appellant claim to be a member of the Indonesian Armed Forces.

At about 4.20 p.m. Assistant Superintendent Khosa interviewed the second appellant at the marine police station. In answer to questions put to him after caution, he said that he had come to Singapore on 10th March with the first appellant, that after lunch they had gone to a building and placed two bundles on a staircase, that he had lit the fuse at about 3 p.m., and that after leaving the building he had got on a bus. Later that day he was charged with the murders and after caution, he made a statement repeating what he had already said and also saying that he had come to Singapore on the instructions of "Kommando Operasi Tertinggi" and that his instructions were as a sworn soldier to carry a parcel and light it "at the electric power station . . . or any other building".

At 6.15 p.m., the first appellant had an interview with Mr. Yeo, then fourth magistrate. He told him that he was a member of the Indonesian Army and that he had come to give the magistrate information with regard to the duties he had been instructed to perform by his superiors. After the magistrate had satisfied himself that this appellant wished to make a voluntary statement, what the appellant said was recorded. In substance he repeated what he had already said but he added that he had been instructed by Lieutenant Paulus Subekti to cause trouble in Singapore.

On 18th March the appellants were picked out at an identification parade by a bus conductor. His bus had gone down Orchard Road just before the explosion and he said that at the traffic lights just beyond the bus stop by the Hongkong and Shanghai Bank the appellants boarded his bus. He said that they were then dressed in civilian clothes.

The appellants were tried in the High Court by Chua J. sitting alone in accordance with the provisions of the Emergency (Criminal Trials) Regulations, 1964.

The first point taken by Mr. Le Quesne on behalf of the appellants was that these Regulations were inconsistent with the Federal Constitution of Malaysia and so had no validity. In March 1965 Singapore was part of the Federation. The Regulations *inter alia* dispensed with the requirement of a preliminary inquiry before trial, restricted the granting of bail and made provision for trial by a judge sitting alone.

Article 8(1) of the Constitution provides that all persons are equal before the law and entitled to the equal protection of the law. Mr. Le Quesne contended that the Emergency Regulations amounted to a denial of the equal protection of the law since persons tried under the Regulations were deprived of the benefits of the procedure under the Criminal Procedure Code and so were treated not equally but differently from persons tried under that Code. He therefore contended that they were inconsistent with the Constitution and so invalid.

By article 150 of the Constitution the Yang di-Pertuan Agong was given power in certain circumstances to issue a proclamation of emergency, and, while such a proclamation was in force, Parliament was given power by article 150(5) notwithstanding anything in the Constitution, to make laws with respect to any matter if it appeared to Parliament that the law was required by reason of the emergency. Article 150(6) provided that subject to article 150(6A) (which is not relevant to this case), no provision of any Act of Parliament so passed should be invalid on the ground of inconsistency with any provision of the Constitution.

Pursuant to the powers given by this article, the Emergency (Essential Powers) Act, 1964, was passed. This gave the Yang di-Pertuan Agong wide powers of making regulations, called in the Act the Essential Regulations, which he considered desirable or expedient for securing public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community.

The Act expressly stated that the Essential Regulations might provide for amending, suspending or modifying any written law, and by

section 2(4) declared that the Essential Regulations should have effect notwithstanding anything inconsistent therewith contained in any written law other than the Act itself or in any instrument having effect by virtue of any written law other than the Act itself.

Mr. Le Quesne did not seek to challenge the validity of the Act. He contended that the words "written law" in the Act were not, despite the Interpretation and General Clauses Ordinance 1948, to be interpreted as including the Constitution. He pointed out that article 150(5) of the Constitution itself distinguished between the Constitution and written law.

In the Ordinance it is stated that "written law" means all Acts of Parliament, Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder and includes the Federal Constitution.

The Emergency (Criminal Trials) Regulations 1964 were made under the Emergency (Essential Powers) Act 1964 and if it were the case that the Regulations were inconsistent with the Constitution, nevertheless if "written law" in section 2(4) of the Act includes the Constitution, the validity of the Regulations cannot be impeached.

Their Lordships can find nothing in the context which requires them to give a different meaning to the words "written law" than that prescribed by the Ordinance and they do not consider that the words of article 150(5) "any provision of this Constitution or of any written law" are any indication that the words "written law" in the Act were intended to have any different meaning to that stated in the Ordinance.

For these reasons their Lordships are unable to accept this contention.

At the opening of the trial counsel for the appellants asserted that they were both members of the Indonesian armed forces and that they were entitled to the protection of the Geneva Convention relative to the Treatment of Prisoners of War 1949. In 1962 the Geneva Conventions Act was passed in the Federation of Malaya to give effect to this, among other, Conventions.

Section 4(1) of this Act provides *inter alia*, that the court before which a protected prisoner of war is brought up for trial for any offence shall not proceed with the trial until it is proved to the satisfaction of the court that a notice giving the full name and description of the accused and other details about him including the offence with which he is charged and the court before which the trial is to take place and the time and place of trial has been served not less than three weeks previously on the protecting power and on the accused and the prisoner's representative.

In support of this contention the first appellant gave evidence that he was a member of the Indonesian armed forces, a corporal in the "Korps Kommando Operasi", a regular force. He swore that when they had been rescued from the sea, he and the second appellant had been wearing uniform. He said that his and the second appellant's identity cards had been in plastic bags which were lost when their sampan sank. The second appellant also gave evidence that he was a member of the Korps Kommando Operasi and that he was wearing military uniform when he was rescued. He also said that he had not been allowed by his commander to wear his identity disk. After hearing evidence from the bumboat man and the other witnesses who had seen the appellants shortly after their rescue as to the appellants' clothing, the learned judge ruled that the appellants were not entitled to the status of prisoners of war. He said that the evidence was overwhelming that when they were rescued they were not wearing uniform. He also found that they first claimed to be fishermen while later on one claimed to be a farmer. He held that they had failed to discharge the onus of proving that they were members of the regular armed forces of Indonesia and that he had no doubt that they were not members of the regular armed forces of Indonesia.

He added that if they were members of the Indonesian armed forces, they were not in his opinion entitled to the status of prisoners of war. "In my view" he said "members of enemy armed forces who are combatants and who come here with the assumption of the semblance of peaceful pursuits divesting themselves of the character or appearance of soldiers and are captured, such persons are not entitled to the privileges of prisoners of war".

After the hearing of the appeal by the Federal Court affidavits were filed on behalf of the appellants sworn by two officers of the Indonesian Army, stating that the appellants had since March 1965 been members of the Indonesian armed forces and serving in units under the "Kommando Mandala Siaga" and documents purporting to be their personal military records were produced.

None of this information was obtainable during confrontation between Indonesia and Singapore or prior to the hearing of the appeal by the Federal Court.

At the trial both appellants retracted the statements they had made. They said that they had left Indonesia on 13th March and that their sampan had sunk while they were on their way to a place in Singapore to collect a boat.

Mr. Le Quesne argued that the information obtained from Indonesia showed that the judge's conclusion that the appellants were not members

of the Indonesian armed forces was wrong and, having found that they were not telling the truth about that, he consequently rejected their *alibi* defence.

Even if it be the case that they were at the time members of the Indonesian armed forces and that the judge's conclusion that they were not was wrong, there were in their Lordships' opinion ample grounds for the rejection of the *alibi* defence. Their Lordships see no reason to suppose that the learned judge's conclusion materially contributed to the rejection of the *alibi* defence which conflicted with the statements that each of the appellants had made immediately after capture.

Mr. Le Quesne further argued that as the appellants had retracted their statements, they should not under the law of Malaysia have been admitted in evidence unless there was some evidence to corroborate them. This argument was advanced before and rejected by the Federal Court. In support of it certain Indian cases were cited. The Federal Court adopted the view of the Malayan Union Court of Appeal in *Yap Sow Keong* v. *Public Prosecutor*,[1] where it was said that an accused person can be convicted on his own confession, even when it is retracted, if the court is satisfied of its truth; and where the court said it did not agree with the Indian decisions which lay down that before a person can be convicted on his retracted confession, there must be corroborative evidence to support it.

In their Lordships' opinion if, contrary to the view of the Federal Court, corroborative evidence is required, it was present in this case. The evidence of the bus conductor which was accepted by Chua J. corroborates the statements made by each of the appellants that when they left the building they got on a bus.

Mr. Le Quesne also argued that the appellants were prisoners of war within the Geneva Convention and that the requirements of that Convention were not complied with, with the result that there was a mistrial.

Article 2 of the Convention provides that it shall apply to all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. At the commencement of the trial State Counsel submitted that there was no state of war or armed conflict between Indonesia and Malaysia at the time but when Chua J. said that in his view there was a state of armed conflict, State Counsel did not pursue the matter. The first question dealt with by the Federal Court was whether or not the Convention was applicable to Singapore. That court declined to decide the question which, they said, had not been raised before the trial judge and that court dealt with the appeal on the assumption that the Convention was applicable to Singapore. Mr. French for the respondent sought to argue before the board that it was not but as this question had not been raised at the trial, he was not given leave to do so.

The appeal was therefore heard on the basis that the Convention applied to Singapore and that at the time there was a state of armed conflict between Indonesia and Malaysia.

The issue to be determined is whether in the circumstances of this case, the appellants were entitled to the protection of the Convention. The view of Chua J. on this has already been stated. The Federal Court held that there could not "be the least doubt that the explosion at MacDonald House was not only an act of sabotage but one totally unconnected with the necessities of war". They went on to say:—

> "It seems to us clear beyond doubt that under international law a member of the armed forces of a party to the conflict who, out of uniform and in civilian clothing, sets off explosives in the territory of the other party to the conflict in a non-military building in which civilians are doing work unconnected with any war effort forfeits his right on capture to be treated as a prisoner of war."

They consequently held that the appellants were not prisoners of war within the meaning of the Convention.

It is first necessary to consider the Regulations annexed to the Hague Convention concerning the Laws and Customs of War on Land of 1907. The first section of those Regulations is headed "Of Belligerents" and article 1 is the first article in that section and in the Chapter headed "The Status of Belligerents". It reads as follows:—

> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:—
>
> (1) To be commanded by a person responsible for his subordinates;
>
> (2) To have a fixed distinctive emblem recognisable at a distance;
>
> (3) To carry arms openly; and
>
> (4) To conduct their operations in accordance with the laws and customs of war.
>
> In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

Chapter II of this section is headed "Prisoners of War". The Regulations do not in terms say that a person with the status of belligerent is on capture entitled to be treated as a prisoner of war but that is clearly implied. As Dr. Jean Pictet said at page 46 in the "Commentary on the Geneva Convention" published by the Red Cross in 1960:—

> "Once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most

important of these is the right, following capture, to be recognised as a prisoner of war."

Article 29 of the Regulations reads as follow:—

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Accordingly, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. . . ."

Article 31 says:—

"A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war. . . ."

These two articles show that soldiers who spy and are captured when wearing a disguise are not entitled to be treated as prisoners of war. In "War Rights on Land" by Mr. J.M. Spaight published in 1911 the following appears at page 203:—

"The spy is usually a soldier who has abandoned the recognised badge of his craft and his nation and adopted some disguise to shield his real character and intent. He has thrown away the insignia of his status, the evidence of his brotherhood among fighting men. . . . The spy in modern war is usually a soldier who dons civilian dress, or the uniform of the enemy, or of a neutral country. . . ."

Article 4 of the Geneva Convention added a number of new categories of persons entitled to treatment as prisoners of war. It is only necessary to refer to article 4A, sub-paragraphs (1), (2) and (3). They read as follows:—

"4A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:—

(1) members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces;

(2) members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, providing that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:—

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognisable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war;

(3) members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power."

The wording of sub-paragraphs (1) and (2) is clearly modelled on article 1 of the Hague Regulations. The conditions which have to be fulfilled by militias and volunteer corps not forming part of the army or armed forces are the same.

There is no indication in the Convention that its intention was to extend the protection given to soldiers beyond that given by the Regulations; and in the *Manual of Military Law* Part III (1958) in paragraph 96 it is stated:—

"Should *regular* combatants fail to comply with these four conditions, they may in certain cases become unprivileged belligerents. This would mean that they would not be entitled to the status of prisoners of war upon their capture. Thus regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war."

On this basis the conclusion must be drawn that it does not suffice in every case to establish membership of an armed force to become entitled on capture to treatment as a prisoner of war.

In neither the Hague Regulations nor in the Geneva Convention is it expressly stated that a member of the armed forces has to be wearing uniform when captured to be entitled to be so treated. In the case of certain militias and volunteer corps certain conditions have to be fulfilled in relation to those bodies for a member of them to be entitled to treatment as a prisoner of war. It is not, however, stated that such a member must at the time of his capture be wearing "a fixed distinctive sign recognisable at a distance".

International law, however, recognises the necessity of distinguishing between belligerents and peaceful inhabitants. "The separation of armies and peaceful inhabitants" wrote *Spaight* in "War Rights on Land", *supra*, at page 37 "is perhaps the greatest triumph of international law. Its effect in mitigating the evils of war has been incalculable". Although paragraph 86 of the *Manual of Military Law, supra*, recognises that the distinction has become increasingly blurred, it is still the case that each of these classes has distinct rights and duties.

For the "fixed distinctive sign to be recognisable at a distance" to serve any useful purpose, it must be worn by members of the militias or volunteer corps to which the four conditions apply. It would be anomalous if the requirement for recognition of a belligerent with its accompanying right to treatment as a prisoner of war, only existed in relation to members of such forces and there was no such requirement in relation to members of the armed forces. All four conditions are present in relation to the armed forces of a country or, as Professor Lauterpacht in *Oppenheim's* International Law 7th Edition volume II at page 259 calls them "the organised armed forces". In "War Rights on Land", *supra*, Mr. Spaight says at page 56 in relation to article 1 of the Regulations:—

"The four conditions must be united to secure recognition of belligerent status."

Pictet at page 48 of the *Commentary on the Geneva Convention, supra,* says:—

"The qualification of belligerent is subject to these four conditions being fulfilled."

and at page 63 in relation to sub-paragraph (3) of article 4A:—

"These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organised hierarchy and they know and respect the laws and customs of war."

In relation to troops landed behind enemy lines, Professor Lauterpacht at page 259 of *Oppenheim, supra,* says that so long as they:—

". . . . are members of the organised forces of the enemy and wear uniform, they are entitled to be treated as regular combatants even if they operate singly."

Thus considerable importance attaches to the wearing of uniform or a fixed distinctive sign when engaging in hostilities. In an article in the *British Year Book of International Law* 1951 by Major R. A. Baxter entitled "So-called 'unprivileged Belligerency'; Spies, Guerillas and Saboteurs" the author at page 343 says:—

"The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. 'Unlawful belligerency' is actually 'unprivileged belligerency'. International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents. The peril to the enemy inherent in attempts to obtain secret information or to sabotage his facilities and in attacks by persons whom he often cannot distinguish from the peaceful population is sufficient to require the recognition of wide retaliatory powers. As a rough-and-ready way of distinguishing open warfare and dangerous dissimulation, the character of the clothing worn by the accused has assumed major importance. The soldier in uniform or the member of the volunteer corps with his distinctive sign have a protected status upon capture, whilst other belligerents not so identified do not benefit from any comprehensive scheme of protection."

In his "Legal Controls of International Conflict" (1954) Professor Julius Stone at page 549 in relation to the distinction between privileged or "protected" or "lawful" and unprivileged or "unprotected" or "unlawful" belligerents or combatants, says:—

"The latter distinction draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection. 'Non-combatants' who engage in hostilities are one of the classes deprived of such protection, but there are also many others. These include notably military personnel who conduct hostilities without conforming to the requirements of article 1 of the Hague Regulations ('guerillas' in the strict sense), spies, and saboteurs. Such unprivileged belligerents, though not *condemned* by international law, are not protected by it, but are left to the discretion of the belligerent threatened by their activities."

At page 563 he says:—

"It is clear, for example, that the donning of disguise by military personnel (for instance of prisoners of war for purposes of escape) does not destroy their status as privileged belligerents."

In a footnote to page 563 he says:—

". . . the greater difficulty of the position of 'evaders' is a practical one, namely, that the circumstances place upon them the burden, a very heavy one, except in cases of escaped prisoners of war, of showing that they are not spies or saboteurs."

This seems to indicate that he regarded the donning of civilian clothes by soldiers to commit sabotage as depriving them of the status of privileged belligerents.

In this appeal it is not necessary to attempt to define all the circumstances in which a person coming within the terms of article 1 of the Regulations and of article 4 of the Convention as a member of an army or armed force ceases to enjoy the right to be treated as a prisoner of war. The question to be decided is whether members of such a force who engage in sabotage while in civilian clothes and who are captured so dressed are entitled to be treated as protected by the Convention.

In paragraph 96 of the *Manual of Military Law, supra,* it is stated that:—

"Members of the armed forces caught in civilian clothing while acting as saboteurs in enemy territory are in a position analogous to that of spies."

and in paragraph 331:—

"If they are disguised in civilian clothing or in the uniform of the army by which they are caught or that of an ally of that army, they are in the same position as spies. If caught in their own uniform, they are entitled to be treated as prisoners of war."

In "The Law of Land Warfare" (1956) the American equivalent to the *Manual of Military Law,* the following paragraph appears:—

"74. Necessity of uniform. Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces."

In Ex parte Quirin,(2) the United States Supreme Court had to consider motions for leave to file petitions for writs of *habeas corpus.* The case related to a number of Germans who during the course of the last war landed in uniform on the shores of the United States with explosives for the purpose of sabotage. On landing they put on civilian clothes. They were captured. In the course of delivering the judgment of the Supreme Court, Chief Justice Stone said at page 12:—

"The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking

to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war. . . ."

and at page 15:—

"By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."

In the light of the passages cited above, their Lordships are of the opinion that under international law it is clear that appellants, if they were members of the Indonesian armed forces, were not entitled to be treated on capture as prisoners of war under the Convention when they had landed to commit sabotage and had been dressed in civilian clothes both when they had placed the explosives and lit them and when they were arrested. In their opinion Chua J. and the Federal Court were right in rejecting the appellants' plea on this ground.

Mr. Le Quesne further contended that the appellants' act in placing the explosives was a legitimate act of war and that they could not therefore be tried for murder. The Federal Court in rejecting the appellants' plea, appear to have done so partly on the ground that placing the explosives in MacDonald House "a non-military building in which civilians are doing work unconnected with any war effort" was not a legitimate act of war. "The immunity of non-combatants from direct attack is one of the fundamental rules of the international law of war" and "non-combatants are not, under existing international law a legitimate military objective" (Professor Lauterpacht in *Oppenheim, supra,* at pages 524 and 525).

As, if they were members of the Indonesian armed forces, in their Lordships' opinion, they forfeited their rights under the Convention by engaging in sabotage in civilian clothes, it is not necessary to consider whether they also forfeited them by breach of the laws and customs of war by their attack on a non-military building in which there were civilians. Having forfeited their rights, there was in their Lordships' view no room for the application of article 5 of the Convention and, not being entitled to protection under the Convention, the appellants' conviction for murder committed by them when dressed as civilians and within the jurisdiction of Singapore cannot be invalidated.

For these reasons, their Lordships were of the opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Jaques & Co.; Charles Russel & Co.*

COMMISSIONER OF THE FEDERAL CAPITAL v. INSURANCE COMPANY OF NORTH AMERICA

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) June 13, 1968]

[K.L. — Federal Court Civil Appeal No. X60 of 1967]

Arbitration — Condition that claim must be referred to arbitration within a time limit — Lapse of time — Inherent jurisdiction of court to restrain limitation being pleaded — Arbitration Ordinance, 1950, s. 5.

Insurance — Limitation period in contract of — Lapse of time — Inherent jurisdiction to restrain defendants' setting up limitation as defence in certain circumstances.

Limitation — Lapse of time — Court has power to prevent limitation being pleaded — Civil Law Ordinance, 1956, s. 3(1) and Courts of Judicature Act, 1964, ss. 23(2) & 25(2).

The respondent, insurer for the appellant, was brought in as a third party to an action instituted by the Central Electricity Board against the appellant, claiming compensation for damage caused to certain electrical installations. Clause 7 of the contract of insurance read:— "If the company shall disclaim liability . . . and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration . . . the claim shall for all purposes be deemed to be abandoned . . ."

The notice of disclaimer was served on the appellant on March 12, 1965. On August 4, 1965, the respondent applied for an order under section 5 of the Arbitration Ordinance, 1950, to stay further proceedings until the differences between the appellant and the respondent were submitted to arbitration. The order was granted on September 26, 1966, that is, after the expiry of the contractual period of limitation.

The appellant by way of motion, applied for a variation of the order to the effect that the respondent should be precluded from relying on the lapse of time between August 4, 1965 and September 26, 1966 in computing time for the purpose of pleading limitation under clause 7 of the contract as a defence to the claim in the arbitration proceedings. Gill J. dismissed the motion ([1967] 2 M.L.J. 161). On appeal,

Held, allowing the appeal: (1) by virtue of section 3(1) of the Civil Law Ordinance and section 23(2) and 25(2) of the Courts of Judicature Act, 1964, the High Court has inherent equitable jurisdiction to restrain a defendant from setting up the defence of limitation under a contract (or statute) if the following circumstances are present: (a) two forums with nominal jurisdiction to hear and resolve a dispute between the same parties; (b) the statutory or contractual period of limitation should have expired whilst the question of the appropriate forum to resolve the dispute was pending; (c) it was beyond the control of the aggrieved party to do anything consistent with his legal rights to escape the consequences of his claim being barred by the effluxion of time;

(2) the conditions necessary for the court to exercise its inherent jurisdiction were present in this case. An order should therefore be made varying the order of September 26, 1966 in terms of the motion.

Cases referred to:—

(1) *MacKenzie* v. *Marquis of Powis* (1737), 7 Brown. 282; 3 E.R. 183.